

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ISMAIL SALI,
Petitioner

Case No. C13-116RSL

THE UNITED STATES OF AMERICA,
Respondent.

ORDER DENYING MOTION
TO VACATE, SET ASIDE, OR
CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

I. INTRODUCTION

This matter comes before the Court on Petitioner Ismail Sali's motion to vacate, correct, or set aside his conviction and sentence pursuant to 28 U.S.C. § 2255 (Dkt. # 1) and Petitioner's motion for complete transcripts and a continuance (Dkt. # 16). Petitioner challenges his conviction and the 84 month sentence imposed after he pled guilty to conspiracy, bank fraud, access device fraud, and aggravated identity theft in CR11-316-RSL. Dkt. # 1-1 at 1.¹

II. BACKGROUND

In September 2011, Petitioner was arrested and charged with one count of conspiracy to commit access device fraud, three counts of bank fraud, two counts of production, use, and trafficking in counterfeit devices, two counts of possession of

¹ “Dkt.” refers to docket entries in Petitioner’s § 2255 case. “CR” refers to docket entries in the underlying criminal case, CR11-316-RSL.

1 device-making equipment, and one count of aggravated identity theft. CR 12; CR 22 at
2 1-11. Two months later, the grand jury returned a superseding indictment, charging
3 Petitioner with the following additional charges: two counts of bank fraud, one count of
4 production, use, and trafficking in counterfeit access devices, one count of possession of
5 device-making equipment, one count of aggravated identity theft, one count of
6 possession of counterfeit and unauthorized access devices, and seven counts of money
7 laundering. CR 46 at 1-16.

8 In March 2012, Petitioner appeared before the Court and pled guilty to one count
9 of conspiracy to commit access device fraud, one count of bank fraud, one count of
10 access device fraud, and one count of aggravated identity theft. CR 85; CR 87. The
11 remaining charges were subsequently dismissed. CR 108 at 1. During the Rule 11
12 hearing, Petitioner informed the Court that he understood the crimes to which he was
13 pleading guilty, the maximum sentences he could receive for the crimes, and the rights
14 that he was giving up by pleading guilty. Dkt. # 11-2 at 9-13. He also indicated that he
15 agreed that certain enhancements and reductions to his base offense level would apply
16 for purposes of determining the appropriate sentencing range under the United States
17 Sentencing Guidelines Manual (“Sentencing Guidelines”). Id. at 15. Finally,
18 Petitioner agreed with the statement of facts set forth in the plea agreement, indicated
19 that his decision to plead guilty was voluntary, and informed the Court that he was
20 pleading guilty because he committed the crimes identified in the plea agreement. Id. at
21 18-21. Based on these representations, the Court found Petitioner’s decision to enter a
22 guilty plea was knowing, voluntary, and intelligent. Id. at 21-22.

23 On June 28, 2012, Petitioner was sentenced to 60 months of imprisonment on the
24 counts of conspiracy, bank fraud, and access device fraud to run concurrently, and 24
25 months of imprisonment on the count of aggravated identity theft, to be served
26

1 consecutively, for a total prison sentence of 84 months. CR 108 at 3. Petitioner timely
2 filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

3 **III. DISCUSSION**

4 In his motion, Petitioner alleges claims of ineffective assistance of counsel based
5 on (1) counsel's failure to provide an adequate translator during their initial meeting and
6 at the sentencing hearing, (2) counsel's advice that Petitioner sign the plea agreement
7 even though it contained factual errors, (3) counsel's failure to dispute the conspiracy
8 charge and the related facts in the plea agreement and presentence report ("PSR"), (4)
9 counsel's failure to dispute the allegations that some of the criminal conduct occurred
10 outside the United States, and (5) counsel's failure to give him discovery in a viewable
format. Dkt. # 1 at 2-6.

11 To succeed on a claim of ineffective assistance of counsel, Petitioner must show
12 (1) that counsel's performance "fell below an objective standard of reasonableness" and
13 (2) that "there is a reasonable probability that, but for counsel's unprofessional errors,
14 the result of the proceeding would have been different." Strickland v. Washington, 466
15 U.S. 668, 694 (1984). When a petitioner claims that his guilty plea was unintelligent or
16 involuntary on the basis of ineffective assistance of counsel, Strickland's two-part test
17 applies. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

18 To meet the first requirement, objectively unreasonable performance, a convicted
19 defendant must point to specific acts or omissions by counsel that he believes not to be
20 the product of sound professional judgment. Id. at 690. To satisfy the second
21 requirement, prejudice, a petitioner must show that "there is a reasonable probability
22 that, but for counsel's unprofessional errors, the result of the proceeding would have
23 been different." Id. at 694. In the context of a guilty plea, Petitioner must show that
24 "there is a reasonable probability that, but for counsel's errors, he would not have

1 pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52,
2 59 (1985). The Court’s focus is on whether counsel’s deficient performance affected the
3 outcome of the plea process. Id.

4 **B. Ineffective Assistance of Counsel**

5 **1. Failure to Provide Adequate Translation Services**

6 Petitioner argues that his trial counsel’s performance was ineffective because he
7 failed to provide adequate translation services during their first meeting and during the
8 sentencing hearing. Dkt. # 1 at 2-3. He contends that the translator did not speak his
9 language, which “resulted in Defendant not understanding the process or the evidence,
10 and created an environment where his attorney did not provide him counsel but merely
gave the impression of doing so.” Id.

11 Petitioner’s first claim of ineffective assistance of counsel fails to meet either of
12 the requirements under Strickland. As for the first prong, the record indicates that the
13 translator present during Petitioner’s first meeting with his attorney and at the
14 sentencing hearing is fluent in Romanian, Petitioner’s native language, and English and
15 she is provided by the Court – not counsel – and has established her proficiency in
16 Romanian. Dkt. # 11-7 at 2. Based on this record, therefore, the Court finds that
17 counsel’s use of this translator did not fall below an objectively reasonable standard.

18 More importantly, however, Petitioner has not suggested that but for counsel’s
19 use of this translator, he would not have pled guilty. Rather, Petitioner makes clear in
20 both his motion and accompanying declaration that he was able to communicate
21 effectively with his counsel at every other meeting with a different Court provided
22 interpreter. Dkt. # 1-1 ¶ 4; see Dkt. # 1 at 3-5 (questioning counsel’s conduct where
23 counsel knew certain facts because Sali explained them to him). Furthermore, Petitioner
24 does not allege that the translator at the Rule 11 hearing was inadequate or that he did

1 not understand that he was pleading guilty. He thus had a full and fair opportunity to
2 review the terms of the plea agreement and an opportunity to state his understanding of
3 the proceedings. To the extent that Petitioner's claim is based on allegedly faulty
4 translation services during the sentencing hearing, he has not demonstrated that he was
5 prejudiced as required under Strickland.

6 **2. Advice Regarding Execution of the Plea Agreement**

7 Petitioner next argues that he was denied effective assistance of counsel when
8 counsel "urged him to sign a Plea Agreement that included an erroneous statement of
9 facts, and charges for crimes of which (sic) he did not commit." Dkt. # 1 at 3. Petitioner
10 does not dispute that his decision to plead guilty was knowing, intelligent and voluntary,
11 but he contends that his counsel promised to correct factual errors, but failed to do so.
12 Id. at 4. Petitioner also argues that his counsel's performance was deficient when he
13 told Petitioner that he would receive a sentence of 24 months of imprisonment. Id. The
14 record does not support Petitioner's contentions and is completely belied by both the
written plea agreement and Petitioner's entry of the plea before the Court.

15 During the Rule 11 hearing, Petitioner indicated that he understood the charges to
16 which he was pleading guilty and the contents of the plea agreement. Dkt. # 11-2 at 9.
17 He confirmed under oath that the statement of facts in the plea agreement was accurate
18 and he agreed with them. Dkt. # 11-2 at 18. After reviewing the elements of each
19 separate crime, Petitioner assured the Court that he was guilty of each crime identified
in the plea agreement. Id. at 19-21. Finally, Petitioner informed the Court that the plea
20 agreement reflected the entire agreement, and he was not pleading guilty as a result of
21 any other promises. Id. at 19. At no time did Petitioner object to any of the facts in the
22 plea agreement or suggest that he was not guilty of any of the charges identified in the
23 plea agreement. Moreover, Petitioner's declarations that he understood and accepted
24 the terms of the plea agreement, that he was not pressured into entering the plea, and

1 that the decision to plead guilty was his, which were all made in open court at the time
2 petitioner entered his guilty plea, carry a strong presumption of verity. Blackledge v.
3 Allison, 431 U.S.63, 74 (1977). Petitioner offers nothing to rebut this presumption.
4 Thus, the Court finds that Petitioner has failed to establish either inadequate
5 performance by his counsel or actual prejudice under Strickland. Hill, 474 U.S. at 58-
6 59.

7 With respect to counsel's alleged assurance that Petitioner would serve no more
8 than 24 months in prison, this allegation is also completely unsupported by the record.
9 The Court carefully reviewed the sentencing provisions of the plea agreement with
10 Petitioner during the Rule 11 hearing. Dkt. # 11-2 at 10, 13-16. In response to the
11 Court's questions, Petitioner indicated that he understood the maximum sentence he
12 could receive for each crime, and that the government could recommend a sentence of
13 not more than eight years and his counsel was free to recommend a sentence no less than
14 six years. Id. at 10, 15-16. Furthermore, Petitioner acknowledged that regardless of
15 these recommendations, the Court was free to impose any sentence authorized by law,
16 up to twenty years of imprisonment. Id. Finally, Petitioner, under oath, informed the
17 Court that no one made any promises regarding the actual sentence that could be
18 imposed. Id. at 14. Faced with this record, the Court cannot conclude that counsel's
performance was deficient.

19 Even if the Court assumes that counsel made such a statement at some point,
20 Petitioner was not prejudiced by counsel's alleged statements regarding his sentence.
21 The written plea agreement and the Court's questioning of Petitioner both informed him
22 of the maximum prison sentence he could receive as a result of pleading guilty and that
23 ultimately, the Court retained the ultimate authority to determine his sentence.
24 Petitioner was therefore fully informed regarding the sentence he could receive as a

1 result of pleading guilty, and he cannot demonstrate that he was prejudiced by his
2 counsel's alleged statements. Womack v. Del Papa, 497 F.3d 998, 1003 (9th Cir. 2007).

3 **3. Failure to Dispute Petitioner's Involvement in the Conspiracy**

4 Petitioner's third claim of ineffective assistance of counsel is based on counsel's
5 alleged failure to dispute the conspiracy charge and allegations of fact supporting the
6 conspiracy charge in the plea agreement and the PSR. Dkt. # 1 at 4-5. To the extent
7 that this claim is based on counsel's advice to sign the plea agreement despite erroneous
8 factual statements, Petitioner has not met the two-part test of Strickland, as explained
9 above. To the extent that Petitioner's claim is based on counsel's alleged failure to
10 argue at sentencing that Petitioner had a minor role in the conspiracy, this claim likewise
does not succeed.

11 Contrary to Petitioner's contention, counsel argued that Petitioner was not a
12 leader in the criminal activity, both in the sentencing memorandum and during the
13 sentencing hearing. Dkt. # 11-4 at 3, 4-6; Dkt. # 11-5 at 9, 12-14, 16. Throughout the
14 hearing, counsel presented Petitioner's role precisely as he describes it in his motion.
15 Dkt. # 11-5 at 12-14. Consistent with Petitioner's representation, counsel explained that
16 Petitioner's co-conspirators, Eugen Trica, Dan Petri, and Ion Armeanca, Romanian
17 citizens, arrived in Seattle, Washington, and Petitioner showed them hospitality and let
18 them stay with him. Id. at 12-13. Counsel emphasized that these individuals initiated an
19 elaborate fraudulent scheme involving sophisticated card skimming equipment and pin
hole cameras while Petitioner provided a place for them to stay and played a small role
20 in the scheme. Id. He reiterated that Petitioner's prior criminal skimming activity was
21 less sophisticated. Id. Because counsel argued the very points that Petitioner sets forth
22 in his motion, the Court cannot conclude that counsel's performance fell below an
23 objectively reasonable standard.

1 Moreover, the record does not support a finding that Petitioner was prejudiced by
2 Counsel's arguments. Contrary to Petitioner's allegation, dkt. # 1 at 5, the Court did not
3 apply a four point leadership enhancement to Petitioner's offense level, dkt. # 11-5 at
4 26. Rather, in determining the applicable sentencing range, the Court applied a two
5 level enhancement pursuant to Section 3B1.1 of the Sentencing Guidelines based in part
6 on the difference between Petitioner's criminal activity before and after his co-
7 conspirators began living with him. Id. Petitioner, therefore, has not established that he
8 suffered prejudice as a result of counsel's arguments regarding his role in the offense
9 conduct.

10 **4. Failure to Dispute Criminal Conduct Outside of the United States**

11 Petitioner next claims that counsel was ineffective because he did not dispute the
12 alleged criminal nature of several wire transfers made by Petitioner to people in
13 Romania. Dkt. # 1 at 5. He contends that he suffered prejudice because the Court
14 applied a two level enhancement to his base offense level because a substantial part of
15 the criminal scheme was committed outside of the United States and it involved
16 sophisticated means. Id. Like Petitioner's previous claim, however, this claim does not
17 succeed because Petitioner has not satisfied either of the two requirements under
18 Strickland.

19 First, the Court finds that counsel's performance did not fall below an objectively
20 reasonable standard because, contrary to Petitioner's claim, counsel filed objections to
21 the paragraphs in the PSR stating that Petitioner sent stolen customer information and
22 wired money to associates and co-conspirators outside of the United States. Dkt. # 13-2
23 at 29. Similarly, counsel argued during the sentencing hearing that some of the wire
24 transfers overseas were directed to Petitioner's family in Romania, not criminal
25 associates. Dkt. # 11-5 at 21. The record therefore, supports a finding that counsel did
26 in fact dispute the allegations that Petitioner was involved in criminal activity outside of

1 the United States. Based on this record, the Court cannot conclude that counsel's
2 performance was below professional standards.

3 Second, counsel's failure to object specifically to the application of a two level
4 enhancement based on the fact that part of the scheme was committed outside of the
5 United States was not unreasonable because any objection would have been without
6 merit. See Shah v. United States, 878 F.2d 1156, 1162 (9th Cir. 1989) ("The failure to
7 raise a meritless legal argument does not constitute ineffective assistance of counsel.")
8 (quotations omitted). In the plea agreement, the parties agreed that a two level
9 enhancement applied to Petitioner's base offense level because "a substantial part of the
10 scheme was committed outside the United States and the offense involved sophisticated
11 means" pursuant to Section 2B1.1(b)(9) of the Sentencing Guidelines. Dkt. # 11-1 at 8.
12 Moreover, Petitioner pled guilty to conspiracy to commit access device fraud, dkt. # 11-
13 1 at 2, and thus, he may be held accountable for the reasonably foreseeable conduct of
14 his co-conspirators in furtherance of the conspiracy. See U.S.S.G § 1B1.3(a)(1)(B)
15 (2011).² Because Petitioner agreed to the application of the enhancement, both in the
16 plea agreement and during the Rule 11 hearing, dkt. # 11-2 at 15, and he may be held
17 accountable for the foreseeable criminal conduct of his co-conspirators, there was no
basis for his counsel to object. Shah, 878 F.2d at 1162.

18 **5. Failure to Provide Discovery in Viewable Format**

19 Finally, Petitioner argues that counsel's failure to provide him with discovery in a
20 viewable format constitutes ineffective assistance of counsel. Dkt. # 1 at 5-6.
21 Specifically, Petitioner contends that counsel gave him three discs containing discovery,
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23

24 ² There was evidence that Petitioner's co-conspirators, who also pled guilty before
25 going to trial, made withdrawals from banks using counterfeit access devices encoded with
26 foreign bank account data and made wire transfers abroad. Dkt. # 13-2 at 6-8.

1 but he could not access the discovery on two of the three discs. Id. at 6. He alleges that
2 counsel's failure to provide the discovery in another format was deficient. Id.

3 Even assuming that counsel's failure to give Petitioner hard copies of the
4 discovery was deficient, Petitioner has not alleged in his motion that had counsel
5 provided discovery in a different format, he would not have pled guilty. Instead,
6 Petitioner argues mostly that he received a harsh sentence as a result of the plea
7 agreement and he was misled by counsel's failure to clarify his minor role in the
8 criminal conduct. Id. at 6. These claims are insufficient to establish prejudice, where
9 Petitioner was fully informed of his possible sentence, he agreed to the application of
10 several enhancements under the Sentencing Guidelines, and counsel argued that
11 Petitioner played a small part in the overall conspiracy. Because Petitioner has not
12 alleged that he would have insisted on going to trial if he had received discovery in a
13 different format, he has not met the prejudice requirement under Strickland. Hill, 474
14 U.S. at 60 (Petitioner failed to establish prejudice where he did not allege that but for
15 counsel's failure to inform him of his parole eligibility date, he would have pleaded not
guilty).

16 **C. Motion for Transcripts**

17 Petitioner asks the Court to order the government to produce the complete
18 transcripts of the Rule 11 hearing and his sentencing hearing, as well as the letter written
19 by Petitioner and submitted to the Court before sentencing. Dkt. # 16 at 1.

20 Transcripts are not generally produced in paper form and will be provided to a
21 party only for a fee. See 28 U.S.C. §753(f). Transcripts of a hearing may be provided
22 to a petitioner in a § 2255 case at no expense where (1) the movant is proceeding *in
23 forma pauperis*, (2) the district court certifies that the motion is not frivolous, and (3) the
24 transcript is needed to decide the issue. United States v. MacCollom, 426 U.S. 317,
25 320-21 (1976). Having reviewed Petitioner's § 2255 motion, the government's

1 response, and Petitioner's reply, the Court finds that the transcripts are not needed to
2 decide Petitioner's ineffective assistance of counsel claims.

3 To the extent that Petitioner seeks discovery in addition to the transcripts, he has
4 not demonstrated the need for discovery in this case. A petitioner in a § 2255
5 proceeding is not automatically entitled to discovery. Rather, the Court "may, for good
6 cause, authorize a party to conduct discovery." Fed. R. Governing § 2255 Proceedings
7 6(b). Good cause exists "where specific allegations before the court show reason to
8 believe that the petitioner may, if the facts are fully developed, be able to demonstrate
9 that he is... entitled to relief." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997)
10 (quotation marks and citation omitted). Because Petitioner has not shown that full
11 development of the facts in this case may entitle him to relief, the Court DENIES
12 Petitioner's request for discovery and the accompanying request for a continuance.

12 **D. Evidentiary Hearing**

13 Petitioner also requests an evidentiary hearing pursuant to 28 U.S.C. § 2255(b).
14 Dkt. # 1 at 7. Ninth Circuit law does not require an evidentiary hearing on a motion to
15 vacate under § 2255 if "the motion and the files and records of the case conclusively
16 show that the prisoner is entitled to no relief." United States v. Moore, 921 F.2d 207,
17 211 (9th Cir. 1990). Generally, an evidentiary hearing is required if the motion is based
18 on matters outside the record or events outside the courtroom. United States v.
19 Burrows, 872 F.2d 915, 917 (9th Cir. 1989). However, "[m]erely conclusory statements
20 in a § 2255 motion are not enough to require a hearing." United States v. Johnson, 988
21 F.2d 941, 945 (9th Cir. 1993). Because the parties' memoranda and the records of the
22 underlying criminal conviction conclusively show that Petitioner is not entitled to the
23 relief he seeks, Petitioner's request for an evidentiary is DENIED. Moore, 921 F.2d at
24 211.

24 **E. Certificate of Appealability**

25 ORDER DENYING MOTION TO VACATE,
26 SET ASIDE OR CORRECT CONVICTION
AND SENTENCE UNDER 28 U.S.C. § 2255 - 11

A petitioner seeking post-conviction relief under § 2255 may appeal a district court’s dismissal of his federal petition only after obtaining a certificate of appealability from a district or circuit court. A certificate of appealability may issue only where a petitioner has made “a substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(3). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Under this standard, the Court concludes that Petitioner is not entitled to a certificate of appealability with respect to any of his claims in his § 2255 motion.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner's motion to vacate, set aside, or correct sentence (Dkt. # 1) and his motion for transcripts and a continuance (Dkt. # 16) are DENIED. The Court declines to issue a certificate of appealability.

DATED this 24th day of January, 2014.

Robert S. Lasnik
Robert S. Lasnik
United States District Judge

ORDER DENYING MOTION TO VACATE,
SET ASIDE OR CORRECT CONVICTION
AND SENTENCE UNDER 28 U.S.C. § 2255 - 12